

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

John Nephew,  
Complainant,  
vs.

**PROBABLE CAUSE  
ORDER**

Highland Sanitation Incorporated, David  
Stewart, Susan Stewart, and Bob  
Cardinal,

Respondents.

**TO: Above Parties:**

The above-entitled matter came on for a telephone probable cause hearing as provided by Minn. Stat. § 211B.34, before Administrative Law Judge Barbara L. Neilson on October 17, 2011, to consider a complaint filed by John Nephew on October 7, 2011. The record closed on October 18, 2011, upon receipt of Exhibit L.

The Complainant, John Nephew, participated without counsel.

James Gasperini, Attorney at Law, 3121 S. St. Croix Trail, Afton, MN 55001, appeared on behalf of Respondents Highland Sanitation Incorporated, David Stewart, and Susan Stewart. Susan Stewart also participated in the probable cause hearing. David Stewart was not present.

Respondent Bob Cardinal participated without counsel.

Based upon the record and proceedings in this matter, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

**ORDER**

**IT IS HEREBY ORDERED:**

1. That there is not probable cause to believe that Respondents Highland Sanitation Incorporated, David Stewart, and Susan Stewart violated Minnesota Statutes §§ 211B.06 by including two false statements in a letter sent to customers of Highland Sanitation, and those allegations shall be dismissed.

2. That there is probable cause to believe that Respondents Highland Sanitation Incorporated, David Stewart, and Susan Stewart violated Minnesota Statutes §§ 211B.15, subd. 2, by making an illegal corporate contribution to Mr. Cardinal.

3. That there is probable cause to believe that Respondent Bob Cardinal violated Minnesota Statutes §§ 211B.15, subd. 13, and Minnesota Statutes § 211B.13, subd. 2, by knowingly accepting Highland's corporate contribution to his election campaign.

4. That the alleged violations of Minnesota Statutes §§ 211B.15, subds. 2 and 13, and 211B.13, subd. 2, are referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges pursuant to Minnesota Statute § 211B.35.

Dated: October 21, 2011

s/Barbara L. Neilson  
BARBARA L. NEILSON  
Administrative Law Judge

## **MEMORANDUM**

### **Background regarding Complaint**

Complainant John Nephew is a current member of the Maplewood City Council. Mr. Nephew and another current City Council member, Marv Koppen, are seeking reelection on November 8, 2011. Respondent Bob Cardinal and another candidate, Rebecca Cave, are challenging Mr. Nephew and Mr. Koppen in the City Council election. Respondent Highland Sanitation & Recycling Incorporated (Highland) is registered as a domestic business corporation with the Minnesota Secretary of State.<sup>1</sup> According to the Secretary of State registration, Respondent David Stewart is Highland's Chief Executive Officer.<sup>2</sup> Respondents David and Susan Stewart identify themselves as owners and operators of Highland.<sup>3</sup>

According to the Complaint filed by Mr. Nephew, the City of Maplewood currently has an open or subscription trash hauling system under which each household is required to select one of the City-licensed haulers for weekly trash pickup. The City has been studying its trash hauling system and is in the process of considering changing to an organized system of some kind. One option under consideration is to have a City-wide contract with one or more haulers.

Mr. Nephew was appointed to the Trash Hauling Working Group that was created by the City, along with another City Council member, two Environmental and Natural Resources Commissioners, and two City staff members.<sup>4</sup> One of the responsibilities of the Working Group was to develop a Request for Proposals (RFP) to solicit proposals from haulers regarding how they would serve Maplewood's needs and at what cost. Four trash haulers, including Highland, submitted proposals that were responsive to the RFP. As summarized in a September 20, 2011, Staff Report, the

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<sup>1</sup> Complaint, Exhibit D.

<sup>2</sup> *Id.*

<sup>3</sup> Complaint, Exhibit B.

<sup>4</sup> Complaint, Exhibit E (Sept. 20, 2011, Memorandum to James Antonen, City Manager, from Shann Finwall, AICP, Environmental Planner) at p. 1.

Working Group reviewed and scored the proposals and ultimately recommended that the City Council authorize staff to negotiate with Allied Waste Services (the lowest-cost proposer) for City-wide residential trash collection services.<sup>5</sup>

The Complaint alleges that, on October 6, 2011, a Maplewood resident contacted Mr. Nephew regarding materials he had received in an envelope with his bill from his trash hauler, Highland. These materials consisted of (1) a two-page letter addressed to Highland's valued customers from David and Susan Stewart (who identified themselves as the owners and operators of Highland since 1986); and (2) a campaign flyer for Mr. Cardinal. Among other things, the letter stated that the "current Mayor and Council members are 'trying' to take your rights away by choosing one hauler for you," raised questions about the Working Group's projected savings, and contended that the new system would cost residents more money.<sup>6</sup> The letter encouraged readers to "vote in a new Mayor and new Council members that will do what they are supposed to do, REPRESENT YOU!" and indicated that readers will "find enclosed a brochure for a candidate who wants to represent you and allow you to keep your freedom of choice." The enclosed campaign flyer urged readers to vote for Bob Cardinal on November 8 and included a notation that it was prepared and paid for by Mr. Cardinal's campaign. The flyer noted that Mr. Cardinal disagreed with "the current Maplewood City Council's position of taking away our right to choose who we pay for trash pickup."<sup>7</sup>

In his Complaint, Mr. Nephew contends that, if the City were to adopt organized collection with a vendor other than Highland, Highland presumably would lose its existing single-family residential accounts in Maplewood. He further alleges that Mr. Cardinal has made opposition to organized trash hauling the central platform of his campaign and argues that Highland has a financial interest in promoting the candidacy of Mr. Cardinal.

The Complaint alleges that Highland, David Stewart, and Susan Stewart violated Minnesota Statutes §§ 211B.06 (false political and campaign material) and 211B.15, subd. 2 (illegal corporate contributions), and that Mr. Cardinal violated Minnesota Statutes §§ 211B.13, subd. 2 (knowing acceptance of a contribution prohibited by 211B.15) and 211B.15, subd. 13 (aiding/abetting a violation of Section 211B.15).

### **Prima Facie Determination**

On October 12, 2011, after reviewing the Complaint and its attachments, the Administrative Law Judge issued a Notice of Determination of Prima Facie Violation and Notice of and Order for Probable Cause Hearing. The Administrative Law Judge determined that the Complaint set forth a *prima facie* violation of Minnesota Statutes 211B.06 with respect to two of the six statements in the Stewarts' letter that were alleged to have been false, but dismissed Alleged False Statements 1, 4, 5, and 6. In addition, the Administrative Law Judge determined that the Complaint set forth a *prima facie* violation of Minnesota Statutes § 211B.15, subd. 2, by Highland, David Stewart

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<sup>5</sup> *Id.* at p. 5.

<sup>6</sup> Complaint, Exhibit B.

<sup>7</sup> Complaint, Exhibit C.

and Susan Stewart, as well as a *prima facie* violation of Minnesota Statutes §§ 211B.13, subd. 2, and 211B.15, subd. 13, by Bob Cardinal.

A probable cause hearing on the allegations that survived *prima facie* review (Alleged False Statements Nos. 2 and 3 and the alleged corporate contribution violations) was held by telephone on October 17, 2011.

### **Probable Cause Analysis**

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law that is alleged in the complaint has occurred.<sup>8</sup> The task of the Administrative Law Judge is to determine whether, given the facts in the record, it is fair and reasonable to require the respondent to go to hearing on the merits.<sup>9</sup> If the Judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict in a civil case, a motion to dismiss a campaign violation complaint for lack of probable cause should be denied.<sup>10</sup>

A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. When a defendant offers either testimonial or non-testimonial evidence to controvert the facts appearing in the record, the motion to dismiss must be denied unless the evidence introduced by the defendant makes "inherently incredible" the facts which appear in the record and which are necessary to establish an essential element of the offense charged.<sup>11</sup>

As applied to these proceedings, a probable cause hearing is not a preview or a mini-version of a hearing on the merits; its function is simply to determine whether the facts available establish a reasonable belief that the Respondents have committed a violation. At a hearing on the merits, a panel of three Administrative Law Judges has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards.

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<sup>8</sup> Minn. Stat. § 211B.34, subd. 2. The Office of Administrative Hearings is guided by the standards governing probable cause determinations set forth in Minn. R. Crim. P. 11.03 and in the decision of the Minnesota Supreme Court in *State v. Florence*, 239 N.W.2d 892 (Minn. 1976).

<sup>9</sup> *State v. Florence*, 239 N.W.2d at 902. See also *Hortman v. Republican Party of Minnesota*, OAH Docket No. 15-0320-17530-CV, at 2-3 (October 2, 2006); Black's Law Dictionary 1219 (7<sup>th</sup> ed. 1999) (defining "probable cause" as "[a] reasonable ground to suspect that a person has committed or is committing a crime"); *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 674 (Minn. 2003) ("in civil cases probable cause constitutes a bona fide belief in the existence of the facts essential under the law for the action, and such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it") (quoting *New England Land Co. v. DeMarkey*, 569 A.2d 1098, 1103 (Conn. 1990)).

<sup>10</sup> *State v. Florence*, 239 N.W.2d at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980).

<sup>11</sup> *State v. Florence*, 239 N.W.2d at 903.

## **Alleged Violation of Minnesota Statutes § 211B.06 - False Campaign Material**

The Complaint alleges that Highland and the Stewarts prepared and disseminated false campaign material with respect to the personal or political character or acts of a candidate, in violation of Minnesota Statutes § 211B.06. In order to be found to have violated that statutory provision, a person must intentionally participate in the preparation or dissemination of campaign material that the person knows is false or communicates with reckless disregard of whether it is false. Campaign material is “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election.”<sup>12</sup>

During the probable cause hearing, Respondent Susan Stewart asserted that the Stewarts’ letter did not endorse or encourage anyone to vote for a particular candidate, but was merely intended to let people know they had a choice with respect to the trash system and the City Council election. However, based upon the explicit language of the letter, it appears that the letter was sent to Highland customers for the purpose of influencing voting in the City’s November 8 City Council election. The letter characterized John Nephew and the Trash hauling workgroup as “ill informed”; described the enclosed campaign flyer for Mr. Cardinal as “a brochure for a candidate who wants to represent you and allow you to keep your freedom of choice”; and urged readers to “use your rights, as an individual, to vote on keeping your ‘freedom of choice’ and having less government involvement in your personal decision making.”<sup>13</sup> Under the circumstances, the Administrative Law Judge concludes that there is probable cause to believe that the Stewarts’ letter falls within the definition of “campaign material” set forth in Section 211B.06.

The further question is whether there is probable cause to believe that the Stewarts’ letter contains two false statements regarding the personal or political character or acts of a candidate.

The first statement in the Stewarts’ letter that remains at issue in this proceeding is Alleged False Statement No. 2. After referring to the alleged attempt by the current Mayor and City Council members to “take away [residents’] freedom of choice for their trash hauler,” this portion of the Stewarts’ letter informed Highland customers, “This system will cost residents more money, in the short-term, long-term and immediate future.”

In his Complaint and during the probable cause hearing, Mr. Nephew argued that this statement is false. He stressed that the September 20, 2011, Staff Report concluded that “residents collectively could save over \$500,000 per year” based upon a comparison between the average proposed prices of the top three proposals and the current, average published rates reported by licensed haulers for 2011.<sup>14</sup> In his view, the Stewarts would have known that the statement in their letter was false because Highland’s reported 2011 rates are higher than the amounts reflected in the proposal it

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<sup>12</sup> Minn. Stat. § 211B.01, subd. 2.

<sup>13</sup> Complaint, Exhibit B at p. 1.

<sup>14</sup> *Id.* at pp. 4-5.

submitted in response to the RFP, and Highland is aware that its proposal was not the lowest bid.<sup>15</sup> In addition to the exhibits attached to the Complaint, Mr. Nephew offered into evidence during the probable cause hearing copies of the Highland's 2011 rates as reported to the City of Maplewood,<sup>16</sup> a bill sent by Highland to a customer in April 2011 seeking payment of a higher rate than reported,<sup>17</sup> the proposal Highland submitted in response to the RFP,<sup>18</sup> and the 2011 rates reported to the City by other trash haulers.<sup>19</sup>

During the probable cause hearing, Highland and the Stewarts contended that the statement in the letter was accurate because there are a number of other potential charges that could increase the costs that Maplewood residents would have to pay under an organized hauling system. Among other things, they argued that a cost will be added to the monthly fee charged residents to cover the expenses that will be incurred by the City to purchase trash carts, and the City will incur additional costs when trash carts are damaged. They also raised the possibility that the City will charge other administrative fees, and suggested that costs may be associated with the City enforcing the requirements of the new system. The Respondents further emphasized that the RFP permits haulers to add administrative charges for such items as vacation credits. They pointed out that haulers could experience significant increases in tipping fees if, for example, trash had to be taken to Minneapolis rather than Newport, and predicted that there would be fees associated with the roll-out/staging process, organic waste, and hauler surcharges. Highland and the Stewarts also asserted that the costs incurred by the cities of White Bear Lake, Minnesota; Stillwater, Minnesota; and Austin, Texas for organized trash collection are relevant in assessing the likely cost of a Maplewood system, and provided information regarding those costs during the hearing.<sup>20</sup> Overall, they argued that it was inappropriate for the Working Group to estimate savings before contract negotiations were completed and total costs were known, and underscored the uncertainty regarding costs when the initial contracts end and must be renegotiated.

Mr. Nephew responded that the Respondents' cost arguments were speculative and hypothetical in nature. Mr. Nephew also pointed out that haulers had to itemize proposed handling fees for such matters as vacation credits in their proposals and asserted that that information was taken into account in arriving at the cost savings estimated in the Staff Report. He reiterated that the RFP required a formula to use objective inflationary measures to set price changes over the term of the contract (such as the consumer price index, the fuel index, and actual tipping fees for trash disposal).<sup>21</sup>

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<sup>15</sup> The Staff Report issued on September 20, 2011, noted that Allied Waste Services was ranked as the number one proposer because it had the best overall score when evaluated against seven criteria referenced in the RFP, including the lowest price. Exhibit E at p. 4 (attached to Complaint).

<sup>16</sup> Exhibit H.

<sup>17</sup> Exhibit I.

<sup>18</sup> The proposal submitted by Highland in response to the RFP was submitted as Exhibit L. Due to the not-public nature of this proposal, Exhibit L was filed under seal and was received subject to a Protective Order issued by the Administrative Law Judge during the probable cause hearing.

<sup>19</sup> Exhibit G.

<sup>20</sup> Exhibits N and O. They also provided materials that Mr. Nephew produced in September 2010 addressing frequently asked questions about organized trash collection in which Mr. Nephew mentioned organized collection costs in White Bear Lake. Exhibit M at p. 2.

<sup>21</sup> Exhibit J, §§ 8.2 – 8.4, pp. 25-26.

According to Mr. Nephew, if the City purchased trash containers, the estimated cost of \$500,000 would be spread out over the 5-7 years of the proposed contract. He indicated that the container cost added to residents' fees would be less than 50 cents per month, and contended that there would still be an immediate savings of \$100,000 to \$500,000 over current costs. He is not aware of any other fee that would be imposed by Maplewood, nor does he know of any other communities that have added other administrative fees in organized hauling situations. He also argued that it is difficult to make direct comparisons between the Maplewood proposal and costs incurred in other cities. For example, he pointed out that the White Bear Lake costs include recycling rates, but such costs are not included in the Maplewood RFP because recycling is separate from the trash program. Compost costs are also not included in the current Maplewood proposal. In his view, there is no chance that the costs under the system being considered by Maplewood would be more expensive to residents than the current costs.

At this point, the City is merely in the process of negotiating the details of a final draft contract with the lowest bidder. Should this effort be unsuccessful, City staff will end negotiations with the lowest bidder and begin negotiations with the second ranked proposer, and so on. It is currently expected that the contract negotiations will conclude on November 21, 2011; the City Council will review the draft contract and statutory findings and decide on a contracted or improved subscription approach on November 28, 2011; and the City Council will authorize implementation of the selected system on December 12, 2011. If the City Council chooses a contracted system, the new service is expected to be implemented on October 1, 2012.<sup>22</sup>

After considering all of the evidence in the record and the arguments of the parties at the probable cause hearing, the Administrative Law Judge concludes that there is not probable cause to believe that Alleged False Statement No. 2 violates Minn. Stat. § 211B.06. That statute is directed against false statements of fact, not criticism or unfavorable deductions.<sup>23</sup> The Staff Report contains an estimate of future cost savings; the Stewarts' letter claims that this estimate of future savings is not accurate. Neither the Administrative Law Judge nor anyone else can determine now which position will end up being more correct. It is not even possible to know at this point whether the City will decide that an organized trash collection system is appropriate, let alone what terms would be contained in a final contract for such a system or what, if any, costs, fees, and adjustments would arise over the course of the contract. The challenged statement that the actual costs of an organized system will be higher than those projected in the Staff Report simply is not capable of being proven true or false at this juncture. At most, the statement is a pessimistic assumption about potential future costs and, as an unfavorable inference, it does not fall within the purview of Minn. Stat. § 211B.06.

The second statement in the Stewarts' letter that remains at issue in this proceeding is Alleged False Statement No. 3. According to the letter from the Stewarts:

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<sup>22</sup> Staff Report at 5 (attached as Exhibit E to Complaint).

<sup>23</sup> See *Bundlie v. Christensen*, 276 N.W.2d 65, 71 (Minn. 1979) (interpreting predecessor statute with similar language); *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981).

The city intends to limit the use of vacation credits, to where you need to be gone for at least 21 days to qualify for a credit (that you'll be charged a convenience fee for using no less!).

Mr. Nephew contends that this statement is false. Based on the language of the RFP, Mr. Nephew argued that a hauler would not be prohibited from giving a vacation credit for periods of less than 21 days, or required to charge an administrative fee for service suspension. He also maintained that the reference in the RFP to “three weeks” meant “three weekly trash pickups” and asserted that as few as 14 days of absence could qualify if a vacation started and ended on pickup days. In addition, Mr. Nephew argued that the Stewarts demonstrated reckless disregard by making factual claims in their letter about what will be included in contracts that are not yet negotiated or what was contained in the confidential proposals of three other haulers, particularly in light of their specific knowledge of the proposal process and the content of their own proposal. During the probable cause hearing, Respondents Highland and Ms. Stewart argued that the reference in the letter to 21 days was accurate because the RFP refers to “three weeks.” They also contended that, until the contract is negotiated, the convenience fee for a service interruption “could” be charged.

The Administrative Law Judge concludes that there is not probable cause to believe that Alleged False Statement No. 3 violates Minn. Stat. § 211B.06. The RFP was intended to specify the base minimum requirements of a proposed new system for residential trash collection services.<sup>24</sup> The portion of the RFP describing general requirements applicable to all residential trash collection services specified that residents “shall” be given credit on their next trash bill for extended vacations of “three weeks or more.” While this statement could possibly be read in the fashion urged by Mr. Nephew (i.e., to apply to absences of less than 21 days that extend over three trash pick-ups), the Stewarts’ interpretation that “three weeks” means 21 days is not clearly false. In addition, the Stewarts’ assertion that the City intends to “limit” the use of vacation credits to absences of three weeks or more amounts to an unfavorable deduction or inference based on the language of the RFP that is not prohibited by Minn. Stat. § 211B.06.<sup>25</sup>

The RFP also specified that trash haulers “may” charge a “reasonable, one-time administrative handling fee” to residents for each vacation credit.<sup>26</sup> For this reason, the Stewarts’ statement would have been rendered more accurate if they had stated that “you *may* be charged a convenience fee” for using a vacation credit rather than asserting “*you’ll* be charged a convenience fee” for using such a credit. However, Minnesota Statutes §211B.06 does not require that statements be literally true in every detail, and inaccuracies of expression or detail are deemed immaterial.<sup>27</sup>

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<sup>24</sup> Exhibit J, § 1.5, p. 4.

<sup>25</sup> *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981).

<sup>26</sup> Exhibit J, § 3.21, pp. 17-18.

<sup>27</sup> *Abrahamson v. St. Louis County School District*, A10-2162, Slip op. at 18-19 (Minn. App. Aug. 1, 2011) (cert. granted Oct. 18, 2011); *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).



Finally, similar to the discussion above with respect to Alleged False Statement No. 2, there is no certainty whether the City will ultimately enter into a contract for an organized system, or whether any such contract will include a term that in fact limits the use of vacation credits to three-week absences and includes an administrative handling fee for each vacation credit. Under the RFP, such a contract term would be possible. Moreover, it is not feasible to prove or disprove at this point what the City “intends” to do regarding this subject. For all of these reasons, the Administrative Law Judge concludes that Statement No. 3, while perhaps misleading, is not factually false and does not fall within the purview of Minn. Stat. § 211B.06.

Accordingly, there is no probable cause to believe that Respondents Highland Sanitation Incorporated, David Stewart, and Susan Stewart violated Minnesota Statutes §§ 211B.06 by including two false statements in a letter sent to customers of Highland Sanitation, and those allegations shall be dismissed.

**Minnesota Statutes § 211B.15 – Corporate Political Contributions; and  
Minnesota Statutes § 211B.13, subd. 2 – Knowing Acceptance of Corporate  
Political Contribution**

In his Complaint, Mr. Nephew alleged that Highland, David Stewart, and Susan Stewart violated Minnesota Statutes § 211B.15, subd. 2 (illegal corporate contributions). He further contended that Mr. Cardinal violated Minnesota Statutes § 211B.15, subd. 13 (aiding/abetting a violation of 211B.15) and Minnesota Statutes § 211B.13, subd. 2 (knowing acceptance of a contribution prohibited by 211B.15).

Section 211B.15, subd. 2, prohibits corporations from making contributions to an individual to promote or defeat the candidacy of an individual for election to a political office in Minnesota. Specifically, the statute provides:

A corporation may not make a contribution or offer or agree to make a contribution directly or indirectly, of any money, property, free service of its officers, employees, or members, or thing of monetary value to a major political party, organization, committee, or individual to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office. For the purpose of this subdivision, "contribution" includes an expenditure to promote or defeat the election or nomination of a candidate to a political office that is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of, a candidate or committee established to support or oppose a candidate but does not include an independent expenditure authorized by subdivision 3.<sup>28</sup>

An expenditure is considered to be independent if it is “made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate’s principal campaign

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<sup>28</sup> Minn. Stat. § 211B.15, subd. 2. Independent expenditures as defined in Minn. Stat. § 10A.01, subd. 18, are permitted. See Minn. Stat. § 211B.15, subd. 3.

committee or agent.”<sup>29</sup> “Corporation” is defined to mean: “(1) a corporation organized for profit that does business in this state; (2) a nonprofit corporation that carries out activities in this state; or (3) a limited liability company formed under chapter 322B, or under similar laws of another state, that does business in this state.”<sup>30</sup> Based upon the information from the Minnesota Secretary of State’s website attached to the Complaint, it appears that Highland is a corporation as defined in the statute.

Mr. Nephew alleged in his Complaint and during the probable cause hearing that Highland and the Stewarts made an improper corporate contribution to Mr. Cardinal by enclosing Mr. Cardinal’s campaign flyers and the Stewarts’ letter supporting Mr. Cardinal’s candidacy in company-paid envelopes with customer bills and using the corporate bulk rate postage permit to send the materials to its customers. Mr. Nephew contended that the expense incurred by Highland to include and mail these letters and campaign flyers with the bills sent to its customers constitutes an in-kind contribution from Highland to Mr. Cardinal’s election campaign. Because the mailing included campaign flyers prepared and paid for by Mr. Cardinal’s campaign committee, Mr. Nephew alleged that there was cooperation between the corporation and the candidate/committee and this was not an independent expenditure by Highland.

Mr. Nephew further asserts that Mr. Cardinal knowingly accepted Highland’s corporate contribution to his election campaign. He argues that Mr. Cardinal thereby violated two additional statutes: Minnesota Statutes § 211B.13, subd. 2, which specifies that “[a] person may not knowingly solicit, receive, or accept any money, property, or other thing of monetary value . . . that is a disbursement prohibited by this section or section 211B.15;” and Minnesota Statutes § 211B.15, subd. 13, which specifies that “[a]n individual who aids, abets, or advises a violation of this section is guilty of a gross misdemeanor.”

During the probable cause hearing, Mr. Cardinal acknowledged that he called David Stewart, met briefly with him at Highland in September or early October of 2011, and gave him approximately 100 campaign flyers. Mr. Cardinal stated that he did not request that Highland distribute the flyers, asserted that Mr. Stewart did not say what he would do with the literature, and expressed his belief that it is Mr. Stewart’s prerogative to do whatever he wanted with the flyers. He denied knowing that Highland was going to mail the flyers out to customers but stated, “For all I could see, he [Mr. Stewart] could take them and distribute them to customers in Maplewood by truck.” Mr. Cardinal indicated that he did not intend to circumvent the law or obtain a corporate contribution, and he doesn’t consider Highland to have given him a corporate contribution.

Ms. Stewart acknowledged during the probable cause hearing that her husband, David Stewart, obtained the campaign flyers that were included in the Highland mailing from Mr. Cardinal, but indicated that she was not present during their discussion and did not know what was said. Because Mr. Stewart did not participate in the probable cause hearing, he did not provide any testimony regarding this issue. Ms. Stewart stated that

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<sup>29</sup> Minn. Stat. § 10A.01, subd. 18.

<sup>30</sup> Minn. Stat. § 211B.15, subd. 1.

Highland has 399 customers who live in Maplewood. She believes that Mr. Cardinal's flyers were included in approximately 85 of the bills that were sent out to Highland's Maplewood customers and confirmed that she used Highland's business bulk mail permit to send them. Mr. Cardinal was not asked to pay any compensation to Highland. Ms. Stewart estimated that the total cost of postage for the 85 envelopes was \$36.15 and contended that the inclusion of Mr. Cardinal's flyer did not increase the cost per envelope.

The Administrative Law Judge concludes that the Complainant has submitted sufficient evidence to reasonably tend to show the existence of a violation of Minn. Stat. §§ 211B.15, subds. 2 and 13, and 211B.13, subd. 2. There is probable cause to believe that Highland and the Stewarts provided a thing of monetary value to Mr. Cardinal when they sent some of Highland's Maplewood customers a letter and a campaign flyer promoting Mr. Cardinal's candidacy for City Council. There is also sufficient evidence to suggest that Mr. Cardinal cooperated with or implicitly consented to this approach by visiting Mr. Stewart at his place of business in Newport and providing approximately 100 campaign flyers to him. The Respondents' arguments that this was an independent expenditure that was made by Highland without the cooperation or consent of Mr. Cardinal will require factual determinations and assessments of credibility that must be left to a panel of Administrative Law Judges to decide.

Accordingly, the corporate contribution allegations will be referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges for an evidentiary hearing.

**B. L. N.**